

No. 12,125

IN THE

United States Court of Appeals
For the Ninth Circuit

TUCKER PRODUCTS CORPORATION,
Plaintiff and Appellant,
vs.
GEORGE S. HELMS, etc., et al.,
Defendants and Appellees.

APPELLANT'S PETITION FOR A REHEARING.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
By NORMAN LEONARD,
240 Montgomery Street, San Francisco 4, California,
*Attorneys for Appellant
and Petitioner.*

FILED

DEC 31 1948

PAUL P. O'BRIEN,
CLERK

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**United States Court of Appeals
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TUCKER PRODUCTS CORPORATION,

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*To the Honorable William Denman, Presiding Judge,
and to the Honorable Associate Judges of the
United States Court of Appeals, for the Ninth
Circuit.*

Comes now plaintiff and appellant above named and pursuant to Rule 25 of the above entitled Court, files this, its petition for rehearing of those certain orders made and entered on December 14, 1948 in the above entitled matter, and in support thereof states its grounds as follows:

I.

The order dismissing the appeal was in error because it purported to grant a motion which was not

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.—ss.

Norman Leonard, being first duly sworn, deposes and says:

That he is the attorney for the plaintiff and appellant in the within action; that he makes this verification for and on behalf of said plaintiff and appellant for the reason that said plaintiff and appellant is presently out of the county in which affiant has his offices; that he has read the foregoing Petition for Re-hearing and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to such matters that he believes it to be true.

NORMAN LEONARD.

Subscribed and sworn to before me this 29th day of December, 1948.

(Seal).....

Sig. attested on orig. Dec. by
Alice C. Morse, Not. Pub.

Notary Public in and for the City and
County of San Francisco, State of
California.

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for appellant in the foregoing proceeding and that the foregoing Petition for a Rehearing is in my judgment well-founded and that it is not interposed for delay.

Dated, San Francisco, California,
December 29, 1948.

NORMAN LEONARD.







IN THE

**United States Court of Appeals
For the Ninth Circuit**

TUCKER PRODUCTS CORPORATION,

Plaintiff and Appellant,

vs.

GEORGE S. HELMS, etc., et al.,

Defendants and Appellees.

}

AFFIDAVIT OF NORMAN LEONARD.

STATE OF CALIFORNIA,

CITY AND COUNTY OF SAN FRANCISCO.—ss.

Norman Leonard, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff and appellant in the above entitled matter. That with respect to so much of the Court's order granting a motion to dismiss the appeal purportedly made by the defendants and appellees, the fact is that no such motion was ever served upon your affiant as counsel for plaintiff and appellant, nor on your affiant's office or anybody in your affiant's office, and your affiant is informed and believes and therefore alleges that no such motion was ever filed with the Clerk of the above entitled Court.

That the judgment of the District Court in the above entitled matter was made and entered therein on August 4, 1948. That your affiant, without waiting for the expiration of the statutory period within which notice of appeal might be filed, did file his notice of appeal only seven days after the said judgment was entered, to-wit, on the 11th day of August, 1948, although he might have waited, had he desired to be dilatory, until the 4th day of September, 1948. (In such a case, the statutory period for docketing the record on appeal would not have expired until December 4, 1948, three days after the final tender of the transcript and the filing fees to the Clerk of this Court.) That thereafter and on August 24, 1948, the designation of record on appeal was filed by your affiant on behalf of plaintiff and appellant. That no counter-designation was filed by defendants and appellees.

That almost immediately after August 24, 1948, your affiant's professional attention and energies were almost exclusively directed toward various problems which arose out of the labor relations situation which was then developing in the Pacific Coast maritime industry. That in this connection your affiant avers that his office is counsel for three of the unions which were involved in the said situation, to-wit: International Longshoremen's and Warehousemen's Union, National Union of Marine Cooks & Stewards, and the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association. That the labor relations affairs of said Unions, principally the first two named, are

generally handled by Richard Gladstein, of your affiant's firm, but that Mr. Gladstein was out of the City and County of San Francisco during most of the period of time in question professionally engaged in other matters, and that your affiant was therefore assigned the responsibility of handling the affairs of said Unions during the said period of time. That during the last week of August, 1948 (this was immediately after the filing of the designation of the record on appeal in this matter), there was an intensive series of negotiations between the officers and negotiating committees of the above mentioned Unions and the officers and negotiating committees of the Waterfront Employers Association of the Pacific Coast and of the Pacific American Shipowners Association because of the fact that an eighty-day injunction obtained by the United States Government from the United States District Court for the Northern District of California, No. 28123-H, under the provisions of § 208 of the Labor Management Relations Act of 1947 as amended, was due to expire on September 2, 1948, and in the event that negotiations were unsuccessful, it was clear that there would be a tie-up of all maritime operations on the Pacific Coast. That during the last several days of August and the first two days of September, your affiant was constantly in touch and communication with the officers and committees of the Unions above mentioned and consulting with them, and was advising them in connection with the said negotiations.

That the negotiations were unsuccessful and thereafter on September 2, 1948, the tie-up of the maritime

industry on the Pacific Coast commenced. That this tie-up involved approximately 40,000 employees in the maritime industry on the Pacific Coast and brought the entire maritime industry on the Pacific Coast to a complete standstill. That as a result of this situation and stemming from it, there was extended litigation in which your affiant had to participate personally. Among such litigation was the following:

Beginning on September 1, 1948, and continuing with some interruption until October 28, 1948, there was heard before a Trial Examiner of the National Labor Relations Board a complaint issued by the General Counsel of the National Labor Relations Board against the International Longshoremen's and Warehousemen's Union charging that Union with violations of the Labor Management Relations Act of 1947 upon the ground that that Union's alleged insistence upon certain hiring hall practices contravened certain of the unfair labor practice provisions of the said statute. This hearing (NLRB No. 20-CB-19 and 20-CB-38), as has been indicated, lasted with some interruptions, for the two full months of September and October. The transcript of testimony runs to 2,395 pages and there were over 100 exhibits of a documentary nature introduced. These exhibits contained contracts, negotiating committee minutes, reports, etc. The legal problems presented by this case are novel and complex in that they involve the construction and application of a new statute to a difficult and complicated factual situation.

During an intermission in the aforementioned case against the International Longshoremen's and Warehousemen's Union, your affiant was required to be present in the City of New Orleans, Louisiana, in connection with certain litigation there pending which involved the National Union of Marine Cooks & Stewards and the Pacific Coast Marine Firemen, Oilers, Watertenders & Wipers Association before the National Labor Relations Board, the Federal District Court, and the State Courts of Louisiana. This litigation grew out of picketing by the said Unions for a purpose alleged by the Government to be illegal, e.g., that it was a furtherance of the secondary boycott. Your affiant was present in New Orleans, Louisiana, in connection with these matters from on or about October 10, 1948, to on or about October 16, 1948. The cases involved were NLRB No. 15-CC-10 to 15-CC-15 inclusive, and 39-CC-1 and 39-CC-2 and Federal District Court No. 2265 (Eastern District of Louisiana).

During the intermission in the aforementioned case against International Longshoremen's and Warehousemen's Union, your affiant was in attendance on behalf of that Union at a hearing of a sub-committee of the Committee on Education and Labor of the House of Representatives held in the City and County of San Francisco on October 22, 1948. Your affiant was present both as counsel and as a witness in connection with matters concerning which the said Committee was investigating.

Immediately upon the conclusion of the aforesaid hearing before the National Labor Relations Board

on October 28, 1948, there was commenced on November 1, 1948, before a Trial Examiner of the National Labor Relations Board another hearing on a complaint issued by the General Counsel of the said Board against the National Union of Marine Cooks & Stewards. This hearing (NLRB No. 20-CB-20) continued without interruption until November 12, 1948. The transcript of testimony contained 1,252 pages and over 50 exhibits of a documentary nature were introduced.

Immediately upon the completion of the last mentioned hearing, there was commenced another hearing before a Hearing Officer of the National Labor Relations Board involving certain charges with respect to an alleged jurisdictional dispute in which the National Union of Marine Cooks & Stewards and the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association were involved. This hearing (NLRB No. 36-CD-2 and 36-CD-3) lasted until November 22, 1948, and the transcript of testimony contains 555 pages and some 25 documentary exhibits were introduced. This case was one of first impression in that it involved the construction and application of a section of the Labor Management Relations Act of 1947 which has never heretofore been passed upon by the National Labor Relations Board or by the Courts.

It was necessary for your affiant personally to attend all of the sessions of the various hearings and proceedings as aforesaid as there was no other attorney in your affiant's office who was familiar with the legal and factual problems presented by these cases, and your affiant did attend each of the sessions of each

of the aforesaid proceedings and did devote all of his time, energy and attention during the months of September, October and November to the aforesaid matters.

Beginning with the last week in November, 1948, at about the time of the conclusion of the proceeding which terminated on November 22, 1948, as aforesaid, there were further negotiations between the aforesaid Unions and the aforesaid employer associations which resulted in agreements being reached between the parties with the resumption of work on or about December 1, 1948. That during that last week of November, your affiant again consulted with and advised the officers and committees of the respective Unions, prepared contract language for them, reviewed contract language submitted by the employer associations and generally participated as legal counsel in the negotiations which led up to the termination of the trade dispute.

In the foregoing it appears that your affiant's professional energies and attention during the months of September, October and November, 1948, were quite completely taken up with matters of singular importance not only to his aforesaid clients, but to the entire shipping industry and economy of the Pacific Coast.

For the foregoing reasons, your affiant respectfully urges that the failure to docket the record on appeal in the instant case, while it may be the result of neglect on the part of your affiant, is at the very least a result of very excusable neglect and that the Court

should have exercised its discretion by permitting said record to be docketed.

That in connection with the docketing of the said record, the following facts should be made known to the Court:

That after the filing of the designation of record on appeal on August 24, 1948, your affiant almost immediately became involved in the activities hereinabove recited. That your affiant anticipated that the Clerk of the District Court would make arrangements to docket the record or would obtain the necessary extensions of time within which to do so (which as a matter of fact the Clerk did for the 90 day statutory period). Your affiant does not suggest that the Clerk was in any way derelict in his duties, but your affiant's office's past experience with appeals to this Court were such as to lead your affiant to believe that the matter would be taken care of by the Clerk simply as a matter of routine either by communicating with your affiant prior to the expiration of the 90 day period or by docketing the record and then billing your affiant's office. To your affiant's knowledge, the credit of his office for the payment of transcript and docket fees has never been questioned by any of the Clerks of any of the Courts in which his office practices

On November 26, 1948, your affiant received a telephone call from one of the deputy clerks of the District Court, whose name your affiant cannot now recall, and was advised by said deputy that the transcript was in the District Court Clerk's office and was asked by the deputy what affiant wished to do about it.

Affiant asked why the transcript had not been docketed and was informed that the District Court Clerk's fee had not been paid (your affiant has since checked with his office personnel and is informed and believes and therefore alleges that at no time did the District Court Clerk submit a bill to your affiant's office for payment or request that payment be made, or in any way communicate with your affiant's office between August 24, 1948, and November 26, 1948). That your affiant thereupon in the same telephone conversation informed the same deputy clerk that the check would be sent out immediately for payment of the Clerk's fee, and requested that upon receipt of the check, that the record be transferred to the Clerk of this Court. On the same day, November 26, 1948, your affiant did send a check for the fee to the District Court and this check was accepted by said Clerk and a receipt therefor was issued. That at the same time your affiant sent out with the messenger who delivered the check to the Clerk of the District Court a proposed order for a Judge of this Court to sign, permitting the docketing of the record on appeal, even though the statutory time had expired. A true and correct copy of the instructions to the messenger concerning this matter is attached hereto and marked Exhibit "A". That the said order was not submitted to a Judge of this Court for signature because, so your affiant is informed and believes and therefore alleges, the Clerk informed the messenger that it would be necessary to make a motion under the provisions of Rule 19, and returned the papers. The Clerk typed a notation upon

the sheet which contained the instructions to the messenger to this effect. That notation typed by the Clerk of the Court appears as the last five lines on Exhibit "A" attached hereto.

Thereupon your affiant immediately prepared the notice of motion, motion, affidavit and memorandum of points and authorities, which were filed and served herein on December 3, 1948. It was this motion which the above entitled Court denied on December 14, 1948. (Affiant again wishes to call attention to the fact that at the time the notice of motion was served and filed, the 90 day statutory period which *could* have commenced on September 4, 1948, in the event that the notice of appeal had been filed on the last day which was available to your affiant, had *not* expired.)

For the foregoing reasons, your affiant respectfully prays that the Court grant the within Petition for Rehearing and reconsider its ruling upon your affiant's motion for an order extending time within which to docket the record on appeal and permit the docketing of the record on appeal.

NORMAN LEONARD.

Subscribed and sworn to before me this 29th day of December, 1948.

(Seal)



Sig. attested on orig. Doc. by
Alice C. Morse, Notary Public

Notary Public in and for the City and
County of San Francisco, State of
California.

EXHIBIT A

ATTORNEYS MESSENGER SERVICE

717 Market St. San Francisco 3 DOuglas 2-8778

Case No. 11/26/48

Tucker Products Corp. v. Helms, et al.

Please

Deliver to.....
(Name) (Address)File at.....
(Court)Deliver..... to Sheriff
Writ or Order

Costs Enc..... Costs Pd..... Costs Adv.....

SPECIAL INSTRUCTIONS:

1. Pay fee of \$11.50 to Clerk of District Court.
2. Have Judge sign attached order, and file original; leave as many copies as necessary.
3. Return extra copies to us.

Dear Mr. Leonard:

In the circumstances, it is advisable for you to follow the provisions of Rule 19 with respect to your motion. Papers returned.

A 05636

leonard (n) Atty.

